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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 75-1439.

JERRY LEE SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

Petitioner Jerry Lee Smith submits this Reply Brief in response to the Brief for the United States. The Government advocates the misguided notions that fostered the anomalous result below, where petitioner Jerry Lee Smith was sentenced to federal prison for conduct lawful in the state in which it occurred. The defects of the rulings below are addressed in the Brief for Petitioner. The fallacies in the Government's brief are detailed herein.

Section I(A) of this Reply Brief exposes the Government's failure to consider principles of American federalism in asserting that Congress' "exclusive" authority over the United States mails absolutely precludes adoption of Iowa law as the measure of "obscenity" in a criminal prosecution under 18 U.S.C. § 1461 for *intra*-Iowa mailings. These federalist principles underlie the

Court's determination in *Miller* v. *California*, 413 U.S. 15 (1973), and its progeny, that "obscenity" is measured by "contemporary community standards." The pre-eminence of local concerns and the absence of a need, or Congressionally expressed desire, for national uniformity inspired this approach. Section I(B) details the Government's misreading of the *Miller* decisions in its attempt to avoid the clear fact that Iowa law establishes the "contemporary community standards" governing this case.

Section II demonstrates that the interpretation of 18 U.S.C. § 1461 and the *Miller* line of cases urged by the Government would render that statute unconstitutionally vague as applied to the situation at bar, for here the "community" legislatively decided to permit the distribution of sexually related materials among its citizenry. Finally, Section III relates the essential need at *voir dire* to probe the capacity of potential jurors to apply the "contemporary community standards" test, particularly if jurors are, as the Government argues, free to disagree with their legislature's determination of what is offensive to those standards.

I.

FUNDAMENTAL PRINCIPLES OF FEDERALISM AND THIS COURT'S MILLER LINE OF CASES MANDATE THE ADOPTION OF IOWA LAW AS THE MEASURE OF "OBSCENITY" FOR JERRY LEE SMITH'S 18 U.S.C. § 1461 PROSECUTION FOR INTRA-IOWA MAILINGS.

A. In the Absence of a Congressional Intent to Federalize "Obscenity," Adoption of State Law as the Standard of "Obscenity" Is Appropriate.

The Government argues that Congress' "exclusive" power over the United States mails controls whether Iowa law should be adopted as the governing standard of "obscenity" for Jerry Lee Smith's prosecution under 18 U.S.C. § 1461. (Br. 7, 12-13.) The Government misapprehends the issue presented. Petitioner neither disputes Congress' power over the mails, nor

asserts that Iowa law governs of its own force.[1] Rather petitioner submits that under the doctrine of co-operative federalism, endorsed and applied by this Court, 18 U.S.C. § 1461 should be interpreted as incorporating Iowa law as the measure of "obscenity" in the circumstances of this case.

Recognizing the inevitable incompleteness of much Congressional legislation and the interstitial nature of federal law in our federalist system, this Court has rejected the facile argument that, in interpreting Congressional enactments, federal courts must apply a federal standard without regard to applicable state law. The Court has selected state law as the rule of decision where Congress has not specifically considered the situation presented, and the issues involved are of local importance, or where failure to adopt state law would have adverse consequences. See, *e.g.*, *Wheeler* v. *Barrera*, 417 U.S. 402 (1974); *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204 (1946); *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939), all discussed in petitioner's main brief at 23-30[2];

1. The Government's citations to establish this federal power (Br. 12-13) are thus beside the point. Cf. *Roth* v. *United States*, 354 U.S. 476, 504 n.5 (1957) (Harlan, J., dissenting). None of the cases cited by the Government involved "obscenity" except, ironically, the authorities constitutionally limiting the exercise of the postal powers. Moreover, in *Parr* v. *United States*, 363 U.S. 370 (1960), which reversed mail fraud convictions, the Court stated:

> "it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by *state law* are criminal under the Federal mail fraud statute . . . ." *Id.* at 391 (emphasis added).

Hence, as more fully detailed herein, state law is not, as the Government argues (Br. 16), irrelevant to how Congress has exercised the postal powers.

2. The Government's brief ignores this body of law while mischaracterizing petitioner's argument as premised on the notion that *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938) compels resort to Iowa law. (Br. 15 n.6.) The significance of *Erie* is its recognition of the importance of state law in the operation of our federalist system. The *Erie* principles support the selection by federal courts

(Continued on next page)

cf. *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 591-96 (1973). See also Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 799 (1957); Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 533 (1954); Note, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. Chi. L. Rev. 823 (1976). As Professor Mishkin observed:

> "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation." Mishkin, *supra* at 800 (footnote omitted).

Jerry Lee Smith's conviction for conduct lawful in the state in which it occurred presents the archetypical case for the exercise of this judicial power. The federal statute under which he was sentenced to prison, 18 U.S.C. § 1461, contains no statement of purpose; it simply prohibits the mailing of any "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance." The statute was enacted in 1873 with less than an hour of Congressional debate. Although repeatedly re-enacted,[3] it has never been extensively debated or substantially revised. Hence, the statute on its face does not reflect any intent to proscribe the mailing of sexually related matter without regard to state law.

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of state law in order to flesh out the details of Congressional programs in circumstances such as those present in this case. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 798-99 (1957).

3. See Br. for Petitioner at 30.

The lack of any such Congressional intent is further confirmed in that, despite this Court's ongoing development of the constitutional parameters of "obscenity," Congress has never even provided a definition of what is prohibited by 18 U.S.C. § 1461.[4] Congress has instead left that matter, with its critical First Amendment implications, for determination by this Court.

The Court, in the *Miller* line of cases,[5] has declared that the "intractable obscenity problem"[6] is predominantly a matter of local concern for which there is no need for national uniformity. The Court, therefore, has rejected any mandatory application of a "national standard" for what is "obscene," and adopted an approach based on the local "contemporary community standards." The Court has recognized the right of state legislatures to determine those standards. Indeed, the Court has specifically permitted the option of removing all restraints on the distribution of sexually related material. Moreover, the Court has expressly declared that the "contemporary community standards" test applies in federal "obscenity" prosecutions. (Br. of Petitioner 13-34.) The federalist precepts underlying the *Miller* rulings mandate the adoption of Iowa law as the measure of "obscenity" for Jerry Lee Smith's *intra*-Iowa mailings.

Such a result offends no federal interest: the Government advances no federal interest for prohibiting the mailing of sex-

4. The lottery cases relied on by the Government (Br. 16-17) therefore provide no analogy for the "obscenity" issues at bar. The anti-lottery statute defines what is prohibited— "[a] scheme offering prizes dependent in whole or in part upon lot or chance." 18 U.S.C. § 1302. Moreover, lottery regulation only tangentially involves First Amendment questions. *Ex parte Jackson*, 96 U.S. 727, 733-36 (1877). In contrast, the elusive concept of "obscenity" directly encroaches upon the exercise of sensitive First Amendment rights. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963).

5. *Miller* v. *California, supra; Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973); *Kaplan* v. *California*, 413 U.S. 115 (1973); *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973); *United States* v. *Orito*, 413 U.S. 139 (1973); *Hamling* v. *United States*, 418 U.S. 87 (1974); *Jenkins* v. *Georgia*, 418 U.S. 153 (1974).

6. *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

ually related materials *within* Iowa; this Court has never identified an independent federal interest in regulating "obscenity." Indeed, Mr. Justice Harlan rejected any such claim, noting only a "limited [federal] interest"—not present here—in preventing the "thwarting of state regulation." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 457-58 n.2 (1966) (Harlan, J., dissenting); see *United States* v. *Orito*, 413 U.S. 139, 144 n.6 (1973).[7]

Absent a federal interest, the Court has demanded a clear manifestation of Congressional intent before extending federal criminal proscription to matters within traditional state jurisdiction. In *United States* v. *Bass*, 404 U.S. 336 (1971), the Court overturned a conviction under federal law for possession by a felon of a handgun, refusing to apply the statute to purely intrastate possessions. The Court first noted (*id.* at 348 n.15) that many states do not have laws that prohibit felons from possessing firearms, then stated:

> "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. In *Rewis* [v. *United States*, 401 U.S. 808 (1971)], we declined to accept an expansive interpretation of the Travel Act. To do so, we said then, 'would alter sensitive federal-state relationships [and] could overextend limited federal police resources.' While we noted there that '[i]t is not for us to weigh the merits of these factors,' we went on to conclude that 'the fact that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach].' 401 U.S., at 812." *Id.* at 349-50.

In *United States* v. *Kirby*, 74 U.S. (7 Wall.) 482 (1868), the Court peremptorily reversed a criminal conviction of a local

7. Any claim of a federal interest must satisfy the "compelling interest" test that applies to statutory schemes affecting First Amendment rights. *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); see *Buckley* v. *Valeo*, 424 U.S. 1, 64-65 (1976); *Procunier* v. *Martinez*, 416 U.S. 396, 409-12 (1974); *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

sheriff under a federal statute prohibiting interference with the mails arising from the sheriff's lawful arrest of a mail carrier. The Court stated:

> "The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows. . . . But whether legislation of that character [applying to lawful conduct] be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language." *Id.* at 486; see Br. for Petitioner at 29-32.[8]

Professor Mishkin has stated the governing rule in resolving federal-state choice of law issues: "Our federalism . . . seems to posit generally that in case of doubt, the courts should use state law, leaving new extensions of federal power to the legislative body." Mishkin, *supra* at 814 n.64; see Hart, *supra* at 497-98. This is particularly true where the refusal to apply state law may have adverse local consequences. *Reconstruction Finance Corp.* v. *Beaver County*, *supra*, 328 U.S. at 210; see Mishkin, *supra* at 803-04.

Here a decision not to adopt Iowa law effectively nullifies Iowa's express determination to permit the distribution of sexually related materials among its citizenry.[9] The pervasive impact of the United States mails and other federal instrumentalities on the distribution of materials would necessarily make the federal prohibition the dominant standard. As recognized by the Court in *Lamont* v. *Postmaster General*, 381 U.S. 301, 305 n.3 (1965):

> " 'Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now

8. In an illogical twist to the Court's clear manifestation requirement, the Government cites a number of recent Congressional enactments expressly conditioning federal criminal statutes on state law. (Br. 14-15.) It then asserts that, by negative implication, the failure of Congress in 1873 expressly so to condition 18 U.S.C. § 1461 reflects a Congressional intent to ignore state law.

9. Affirmance of the decisions below would also nullify the similar determinations of a number of other state legislatures. See Brief for the United States at 10; Brief on Behalf of Association of American Publishers, Inc., *et al.*, as Amici Curiae, at 15-16.

> the main artery through which the business, social, and personal affairs of the people are conducted . . . .'"

In their amici curiae brief, the Association of American Publishers, Inc., *et al.*, state at 4-5, "[i]t is the rare book, periodical or film that does not also move through the mails or touch upon interstate or foreign commerce."

Hence, the Government's claim, that its interpretation of 18 U.S.C. § 1461 "does not violate or impede any state policy or standard governing matters within the proper sphere of state regulation" (Br. 20), is plain wrong. Just as this Court has acknowledged the right of state legislatures to prohibit "obscenity" based on inconclusive scientific data of a correlation between exposure to sexually related material and crime, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 60-61 (1973), so it must recognize the right of state legislatures to reject that data and permit access to such materials by its citizenry.

The entire thrust of the *Miller* decisions, in adopting the "contemporary community standards" test, accords respect, within constitutional limits, to the prerogatives of each state to determine how it will treat sexually related material. This approach was taken precisely to honor the diversity of tastes and attitudes prevalent in our Nation.

> "The use of 'national' standards, however, necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." *Miller* v. *California, supra*, 413 U.S. at 32 n.13.

Thus, Jerry Lee Smith's conviction for distributing within Iowa materials acceptable under Iowa law presents the very situation the *Miller* decision sought to prevent.

B. Under the Miller Line of Cases, the Iowa Legislature's Decision Establishes the Applicable "Contemporary Community Standards."

The Government misreads the *Miller* cases to avoid the impact of the "contemporary community standards" test on federal "obscenity" prosecutions. The Government first argues that "contemporary community standards" apply solely to the issue of "prurient interest." (Br. 7.) It then asserts that "prurient interest" is solely a factual inquiry, not a legislative policy issue. (Br. 20.) Finally, the Government contends that Iowa's legislative decision to permit distribution of sexually related material among Iowa adults does not establish "contemporary community standards" binding on Iowa jurors in considering the "fact" question of "prurient interest." (Br. 19.)

This argument is a distortion of the *Miller* decisions. It fails in its initial premise that the "contemporary community standards" test is limited to "prurient interest." That defect is compounded by the Government's description of "obscenity" as a factual absolute rather than a variable concept under the "contemporary community standards" approach. Finally, the argument relies on the anarchistic notion, adopted below, that jurors are free to redetermine what their legislature declares to be the community's values.

The "contemporary community standards" test applies to each of *Miller's* three independent requirements—"prurient interest," "patent offensiveness," and "lack of serious literary, artistic, political or scientific value." The Government attempts to read the statement of the "contemporary community standards" test as restricted to "prurient interest" simply because its first appearance in *Miller* is in clause (a) of the Court's three part formulation of the necessary elements of "obscenity." (Br. 9.) Yet the entire thrust of *Miller* and its progeny demonstrate the patent error of the Government's myopic reading of the cases.

In *Miller*, the Court, in fact, stated:

> "In sum, we . . . hold that obscenity is to be determined by applying 'contemporary community standards. . . .'" 413 U.S. at 36-37 (emphasis added).

The Court also indicated elsewhere in *Miller* that the "contemporary community standards" test applies to the "patently offensive" element of its definition of "obscenity." *Id.* at 30. In *Hamling* v. *United States*, 418 U.S. 87, 104, 105, 107, 114 (1974), the Court repeatedly referred to the "contemporary community standards" test as applying to the entire *Miller* formulation. Mr. Justice Brennan's concurring opinion in *McKinney* v. *Alabama*, 96 S. Ct. 1189, 1200 (1976), interpreted the Court's "contemporary community standards" test as applying to the "patently offensive" issue. See *United States* v. *B & H Distributors Corp.*, 375 F. Supp. 136, 141 (W.D. Wis. 1974); F. Schauer, The Law of Obscenity, 102-05, 123 (1976).

Indeed, the rationale for proscription of "obscenity" is that it is offensive to the community. This is clearly reflected in the history of the "patently offensive" element of the *Miller* test. That element was articulated by Mr. Justice Harlan in *Manual Enterprise, Inc.* v. *Day*, 370 U.S. 478, 482-86 (1962).

He noted:

> "'There is no obscene libel unless what is published is both offensive according to current standards of decency and calculated or likely to have the [prurient appeal] effect . . . .'" *Id.* at 485, quoting *Regina* v. *Close*, [1948] Vict. L. R. 445, 463.

Mr. Justice Brennan expressly made the "patently offensive" test subject to community standards:

> "[M]aterial is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966).[10]

10. *Miller's* criticism of *Memoirs* is limited to the abandonment of the *Memoirs* "utterly without redeeming social value" test. 413 U.S. at 22-25.

The Government, however, argues that the "patently offensive" test for federal prosecutions applies without reference to "contemporary community standards" and is satisfied if the materials contain "'descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*.'" (Br. 16 n.7.) But the *Miller* depiction examples are on their face qualified by the term "patently offensive."[11] "Patent offensiveness" cannot exist in the abstract; somebody must be offended. Under *Miller*, that somebody is the local community.

Recognizing the essential proposition that in a democratic republic the legislature is the institutional mechanism for establishing societal values, the Court has expressly ruled that state legislatures are empowered to set statewide community standards. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974). The Court has emphasized the states' "considerable latitude" in setting such "contemporary community standards" and acknowledged their right to legalize the distribution of sexually related material. *Paris Adult Theatre I* v. *Slaton*, *supra*, 413 U.S. at 64; Br. for Petitioner 14-16.

Thus, the "contemporary community standards" approach by design makes "obscenity" variable from community to community depending upon their differing attitudes. The Court in *Miller* declared that what may be offensive, and therefore "obscene," in one community, may be acceptable, hence constitutionally protected, in another. It was precisely to permit this diversity that the Court rejected "national" standards. *Miller* v. *California*, *supra*, 413 U.S. at 32-33; see *Hamling* v. *United States*, *supra*, 418 U.S. at 106.

11. The depiction examples in *Miller* v. *California*, *supra*, 413 U.S. at 24, are:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

The Government asserts that the Iowa Legislature's decision to follow its acknowledged option to decriminalize "obscenity" does not establish "contemporary community standards." It states that the Iowa Legislature's action is no more than a decision not to prosecute. (Br. 11.)[12] Yet if a state legislature can be said to establish "contemporary community standards" when it declares that certain material will not be tolerated for distribution within the community, it appears self-evident that a legislature, in determining that such materials will be tolerated, likewise is setting "contemporary community standards."

Finally, the Government claims that the admission of the Iowa statute into evidence for consideration by the jury in determining "contemporary community standards" regarding "prurient appeal" was sufficient. (Br. 19-21.) As discussed in petitioner's main brief at 18-22, under our representative form of government, jurors do not have the right to redetermine the legislature's declaration of permissible conduct. The remedy, in the event of a disagreement between the people and their elected representatives, is the ballot box, not the jury box.

II.

THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1461 RENDERS THE STATUTE UNCONSTITUTIONALLY VAGUE AS APPLIED IN THIS CASE.

The Government's only answer to the vagueness problem created by Jerry Lee Smith's prosecution for *intra*-Iowa mailings is the claim that 18 U.S.C. § 1461 put him on notice that "if he distributed obscene material through the mails, he would violate it." (Br. 21.) The question is not whether Jerry Lee

12. The Iowa statute, Iowa Code Ann. ch. 725, directly provides that the statutory prohibition on the distribution of certain sexually related materials to minors is "intended" to be the "sole and only regulation" of sexually related materials in Iowa. *Id.* § 725.9. That statute expressly repealed the prior prohibition on the distribution of "obscenity" to adults.

Smith had notice of the proscription; rather, it is how he could determine what would be "obscene" under that statute.

The statute provides no definition. The only guidance is found in the decisions of this Court. The decisions direct that "obscenity" be measured according to "contemporary community standards." Logically, that requires an examination of the laws governing conduct within the community. In Jerry Lee Smith's case, the law of the community permitted the distribution of all sexually related material. If the community's law can be disregarded in these circumstances, as the Government suggests, there simply are no ascertainable standards. Prosecution and imprisonment under such a statutory scheme is fundamentally unfair and impermissible under the due process clause of the Fifth Amendment. (Br. for Petitioner 34-37.)

The Government's response is that Jerry Lee Smith should have known that the materials he distributed were, as a factual matter, "prurient" and contained depictions of sexual conduct given as examples in *Miller* of the type of material which could be prohibited. (Br. 22.) That argument is but a restatement of the Government's theory that "contemporary community standards" are limited to the "fact" issue of "prurient interest." This erroneous reading of the *Miller* decisions is demonstrated above in Section I(B).[13]

In *United States* v. *Bass*, *supra*, 404 U.S. at 348 n.15, the Court recognized the "real" notice problem presented when federal law proscribes conduct lawful in the state in which it occurs. The *Bass* situation, discussed *supra* at p. 6, did not

13. The Government's assertion, that "[p]etitioner makes no claim that the materials he distributed are not the kind of hard core pornography to which the statute may constitutionally be applied" (Br. 22), is not true. Petitioner never admitted, and the jury did not find, that the materials distributed were "hard core pornography," whatever that may be. Moreover, the issue in this case is not "hard core pornography," but whether the materials distributed by Jerry Lee Smith can be found "obscene" under *Miller*, given the "contemporary community standards" established by the Iowa Legislature.

even involve the compounding factor present here, where the Court has directed an individual, in considering application of the federal proscription, to measure his conduct by reference to "contemporary community standards."

III.

THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1461 REQUIRES VOIR DIRE CONCERNING POTENTIAL JUROR KNOWLEDGE OF "CONTEMPORARY COMMUNITY STANDARDS."

The Government contends that the District Court properly denied petitioner's proposed *voir dire* inquiry of potential juror knowledge of the "contemporary community standards" in Iowa, because it "related to legal issues." (Br. 24.) But the Government fails to perceive the distinction between questions that define a legal concept and *voir dire* inquiry that probes juror capacity to understand and apply the legal concepts. The Government's cited cases address only the former, while petitioner's proffered questions were designed to accomplish the latter.

The definition of legal concepts, such as "reasonable doubt," "presumption of innocence," or "entrapment," is indeed the province of the judge's jury instructions. But inquiry into juror *ability* to apply those instructions is precisely the purpose of *voir dire*—"to test the qualifications and competency of the prospective jurors." *Hamling* v. *United States, supra,* 418 U.S. at 140. The necessity for such *voir dire* is sharply focused by the Government's assertion that jurors can redetermine their legislature's declaration of "contemporary community standards."

CONCLUSION.

Petitioner Jerry Lee Smith's judgment of conviction must be reversed.

Respectfully submitted,

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